92-1533

NO. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

THE STATE OF TEXAS,

Petitioner

v.

LARRY EUGENE MCPHERSON,

Respondent

Petition for Writ of Certiorari
to the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED

Under the Supremacy Clause, does the Eighth Amendment take precedence over Texas general verdict law as embodied in article 37.07(1)(a) of the Texas Code of Criminal Procedure thus authorizing a fourth special issue as a *Penry* vehicle, or can the two work in harmony together as well as satisfy the dictates of *Penry*?

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CONSTITUTION AND STATUTES:

United States Constitution:

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Article VI, Clause 2 . . . . . i, 2, 4, 5, 6
(the "Supremacy Clause")

Statutes of the State of Texas:

Article 37.07(1)(a), Texas Code of Criminal Procedure . . . . . i, 3, 4, 5, 6

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OPINIONS BELOW

The Opinion dated January 3, 1992, of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, in its Cause No. 07-91-0151-CR, reversing the trial court and remanding this cause for a new trial, is reproduced in the Appendix as Appendix "D". It is reported at 828 S.W.2d 81.

The Opinion dated February 12, 1992, of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, in the same cause, on the State's and Defendant's Motions for Rehearing, overruling this Petitioner's Motion for Rehearing is reproduced in the Appendix as Appendix "E". It is not yet reported, but is in the process of being reported.

The Opinion of the Texas Court of Criminal Appeals, in this same cause, but numbered 0354-92 in that Court, on Discretionary Review, delivered November 18, 1992, is reproduced in the Appendix as Appendix "A". It is not yet reported, but is in the process of being reported.

The Opinion of the Texas Court of Criminal Appeals in this cause, under its same cause number, on the State's Motion for Rehearing on Petition for Discretionary Review was denied January 20, 1993, without opinion, and is reproduced in this Appendix as Appendix "B".

JURISDICTION

Within the time allowed by applicable rules and statutes this matter was presented to the Court of Criminal Appeals by the State, as Petitioner, seeking Discretionary Review. The Court of Criminal Appeals of Texas granted Discretionary Review of the decision of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo. That

Court rendering its original opinion, and thereafter denied Petitioner's Motion for Rehearing. On November 18, 1992, the Court of Criminal Appeals delivered its final Opinion herein (Appendix "A") concerning the question at bar. Petitioner, on December 7, 1992, filed with the Texas Court of Criminal Appeals its Motion to Stay Execution of Mandate, which was granted until March 22, 1993. Therefore, it is an appropriate presumption that the action of the Court of Criminal Appeals on November 18, 1992 is final. Relief under the Constitution is sought from the November 18, 1992 action of the Texas Court of Criminal Appeals. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII of the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution Article VI, Clause 2 (the "Supremacy Clause"):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article 37.07(1)(a) of the Code of Criminal Procedure of Texas:

> Art. 37.07. Verdict Must be General; Separate Hearing on Proper Punishment

Sec. 1. (a) The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue.

Article 37.071(b) of the Code of Criminal Procedure of Texas, the Texas death penalty statute provided:[1]

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

STATEMENT OF THE CASE

In April, 1991 the Respondent was found guilty by the jury of capital murder. The State sought the death penalty therefore, according to the Texas death penalty statute, the jury was required to answer three special statutory issues. The jury answered "yes" to the three special issues, "no" to a fourth issue not prescribed by the statute and, pursuant to article 37.071 the trial judge sentenced the defendant to death by lethal injection. On May 30, 1991, based upon the

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[1]As Respondent was convicted on April 3, 1991, all references to art. 37.071 refer to the statute as it appeared then, prior to its amendment on September 1, 1991.

jury's response to the fourth special issue, the trial judge reformed the defendant's sentence to life imprisonment. The Petitioner filed a timely appeal to the Court of Appeals for the Seventh Supreme Judicial District in Amarillo asking the Court of Appeals to change the life sentence back to death because the trial judge had no authority to reform the jury's decision. The Court of Appeals reversed the amended judgment of the trial court in a published opinion and remanded the case for a new trial. Both the Petitioner and the Respondent petitioned the Court of Appeals for a rehearing, which was denied. Next, both the Petitioner and the Respondent petitioned the Court of Criminal Appeals for discretionary review. The Court of Criminal Appeals reversed the Court of Appeals' decision and reinstated the life sentence. The Petitioner petitioned the Court of Criminal Appeals for rehearing but the motion was denied. Relief under the Constitution is sought from the the November 18, 1992 action of the Texas Court of Criminal Appeals. The Court of Criminal Appeals first raised the constitutional issue as indicated above in the Question Presented in its final opinion dated November 18, 1992. That Court held that under the Supremacy Clause the Eighth Amendment takes precedence over Texas general verdict law as embodied in article 37.07(1)(a). Petitioner raised the same constitutional issue in its motion for rehearing to the Texas Court of Criminal Appeals, which was denied.

REASONS FOR GRANTING WRIT

I.

THE SUPREMACY CLAUSE DOES NOT MANDATE THAT THE EIGHTH AMENDMENT TAKE PRECEDENCE OVER TEXAS GENERAL VERDICT LAW AS EMBODIED IN ARTICLE 37.07(1)(a) OF THE TEXAS CODE OF CRIMINAL PROCEDURE THUS AUTHORIZING A FOURTH SPECIAL ISSUE AS A PENRY VEHICLE.

This Court has stated that the application of the Supremacy Clause is determined by whether the state statute in question stands as an obstacle to federal law. *See Goldstein v. California*, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973). However, the exercise of federal supremacy is not to be taken lightly. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522, 101 S.Ct. 1895, 68 L.Ed.2d 402, 461 (1981). "Preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Id. (citing Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981)).

Making the determination of whether federal law preempts state law is basically a two-step process. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). First, the construction of the two statutes must be ascertained and, second, the constitutional question of whether they are in conflict must be determined. *Id.* In deciding whether any conflict exists, a court's concern must be with "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." Id. 450 U.S. at 317-318.

Texas general verdict law as applied in criminal cases and embodied in article 37.07(1)(a) of the Code of Criminal Procedure in no way stands as an obstacle to, does not interfere with, and is not contrary to the Eighth Amendment as applied to Texas death penalty procedure in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Because the Court of Criminal Appeals of Texas has sanctioned the jury nullification charge allowing Texas trial courts, by instruction, to satisfy the mandates of the Eighth Amendment as stated in *Penry, see Fuller v. State*, 829 S.W.2d

190, 209 (Tex. Crim. App. 1992), there is no necessity or authority for utilizing the federal Supremacy Clause to invalidate Texas general verdict law.

Stated differently, when a state statute can work in harmony with the Supremacy Clause, there is no need to invalidate state law. Article 37.07(1)(a) can and does work in harmony with the Supremacy Clause for the very reason that the Texas Court of Criminal Appeals sanctioned the jury nullification charge. Consequently, because the jury nullification charge is an adequate *Penry* vehicle satisfying the requirements of the Eighth Amendment, the Supremacy Clause should not and cannot act to take precedence over Texas general verdict law mandated by article 37.07(1)(a) and allow for a fourth special issue.

Thus, in this case, the only authority that the trial court had was to give a jury nullification instruction if there existed *Penry* evidence that could not have been given effect by the standard submission of the authorized special issues of article 37.071(b). No authority exists for the fourth special issue given, and the Supremacy Clause does not mandate otherwise.

The Court of Criminal Appeals of Texas held that under the Supremacy Clause, the Eighth Amendment takes precedence over Article 37.07(1)(a) of the Texas Code of Criminal Procedure. The Eighth Amendment, however, need not take precedence over Art. 37.07(1)(a) because the two can work in harmony together. As was held in *Fuller v. State*, 829 S.W.2d 190, 209 (Tex.Cr.App. 1992), a jury nullification charge which instructed the jury to answer one of the statutory punishment issues "no" if the jury felt the mitigating evidence militated against the death penalty was sufficient to meet the *Penry* standard. An extra issue, however, contravenes Article 37.07.

CONCLUSION AND PRAYER

Petitioner believes that this Court should, and prays that it will find that the Supremacy Clause does not mandate that the Eighth Amendment take precedence over article 37.07(1)(a) which embraces Texas general verdict law. The Eighth Amendment and article 37.07(1)(a) can work in harmony together. Consequently, petitioner asks that a Writ of Certiorari issue to review the decision of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

THE STATE OF TEXAS — Petition for Discretionary Review from the Seventh Court of Appeals

NO. 0354-92 V.

LARRY EUGENE MCPHERSON, Appellee — (RANDALL County)

OPINION ON STATE'S AND APPELLEE'S PETITIONS FOR DISCRETIONARY REVIEW

Appellee was convicted of capital murder pursuant to Tex. Penal Code Ann. § 19.03 (a) (3). The trial judge submitted the three statutory punishment issues pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (b)[1] and a fourth punishment issue concerning appellee's mitigating evidence. The jury affirmatively answered the three statutory punishment issues but negatively answered the fourth issue, finding the death penalty was not a reasoned moral response after consideration of appellee's mitigating evidence.[2] Appellee

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[1]As appellant was convicted on April 3, 1991, all references to art. 37.071 refer to the statute as it appeared then, prior to its amendment on September 1, 1991.

Tex. Code Crim. Proc. Ann. art. 37.071 (b) provided:

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

[2]We assume, for purposes of this opinion, the mitigating evidence, pursuant to *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989), was sufficient to require a vehicle, beyond the statutory issues, whereby the jury could consider and give effect to such evidence. The State has not argued otherwise, and the Court of Appeals did not address the issue.

was sentenced to death. After consideration of appellee's motion for new trial, the trial judge reformed the judgment to reflect a sentence of life. The State appealed. The Court of Appeals reversed holding that the submission of the fourth punishment issue was not authorized by art. 37.071(b) and remanded for a new trial. McPherson v. State, 828 S.W.2d 81 (Tex. App.-Amarillo 1992).

We granted the State's Petition for Discretionary Review to determine whether the Court of Appeals erred in ordering a new trial rather than reinstating appellee's death sentence.[3] Additionally, we granted appellee's Petition for Discretionary Review to determine whether the Court of Appeals erred in finding the submission of a fourth punishment issue was not constitutionally required under *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989), and whether the Court of Appeals erred in failing to address appellee's claim that double jeopardy barred the State from seeking the death penalty upon retrial.[4] We will reverse.

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[3]The State's ground for review was:

The Court of Appeals erred in reversing and remanding this capital murder case for an entire new trial instead of reforming the sentence of life back to that mandated by law, namely, death by lethal injection.

[4]Appellant's Grounds for Review were:

The Court of Appeals erred in holding that a fourth special issue, under the facts of the instant case, was not constitutionally necessary since a proper instruction would have served the constitutional purposes delineated in *Penry*.

The Court of Appeals erred in failing to address Appellee's (appellant herein) double jeopardy claim and discretional review should be granted to determine whether the Double Jeopardy Clause bars the State from seeking the impose the death penalty against appellee, regardless of whether the trial court accepted an illegal verdict in the punishment phase of his trial. Do you find from the evidence, after considering fully the Defendant's mitigating evidence, if any, that the death penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted?

I.

In addition to the three punishment issues provided by Tex. Code Crim. Proc. Ann. art. 37.071, the trial judge submitted a fourth issue in the punishment charge as follows:

SPECIAL ISSUE NO. 4

> You are instructed that the term "mitigating evidence" is evidence about any aspect of the Defendant's background, his character, and the crime of which he was convicted that you believe, in fairness or mercy, calls for a sentence less than death. The purpose of this fourth special issue is to provide you the jury, if you deem it necessary, with a means of considering and giving effect to the mitigating evidence, if any, presented in this case. The sole question before you now is whether, considering all of the evidence, mitigating, if any, and otherwise, presented in both phases of this trial by either party, the death penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted.
>
> Now bearing in mind these instructions and definitions, you will answer the following special issue:
>
> Do you find from the evidence, after considering fully the Defendant's mitigating evidence, if any, that the death penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted?

The jury responded:

> We, the Jury, or at least ten (10) jurors, find and determine that the answer to this Special Issue is "No."
>
> /s/ C. L. Boykin

Upon the affirmative findings on the three statutory punishment issues and a negative finding on the fourth punishment issue, the trial judge stated:

> Mr. McPherson, the jury has returned its charge, or its verdict to the charge of the offense to which you stand charged by indictment, and that is that you have been found guilty of the offense of capital murder and the Court hereby so finds you guilty of capital murder.
>
> The jury also returned its verdict in this case by which they have answered the first three special issues "no" I'm sorry, first three special issues "yes."
>
> And as you know and understand, the laws of the State of Texas mandates that a "yes" answer of those three special issues result in an automatic determination of the sentence of death by lethal injection according to the laws of the State of Texas.
>
> Counsel has persuaded the Court to submit the issue of mitigation evidence. Mitigating evidence is a matter that is a new concept that the law does not provide for, let me say the statute does not provide for.
>
> It is the order of this Court that the sentence to be imposed in this case is to be death by lethal injection.

Appellee filed a "Motion for New Trial, or In The Alternative, Motion to Reform the Judgment" alleging that he was entitled to relief under Penry v. Lynaugh, 492 U.S.

302, 109 S.Ct. 2934 (1989).[5] The trial judge granted appellee's motion and reformed the sentence from death to life.

II.

The Court of Appeals relied upon Tex. Code Crim. Proc. Ann. art. 37.07 (1) (a) which provides "the verdict in every criminal action must be general." The only exception to the general verdict requirement is art. 37.071 which provides for the submission of statutory punishment issues in the trial of a capital offense. Relying upon our opinions in Pritchard v. State, 35 S.W.2d 717 (Tex.Cr.App. 1931); Kind v. State 117 S.W.2d 800 (Tex.Cr.App. 1938); Garrett v. State,, 262 S.W.2d 414 (Tex.Cr.App. 1953); McCoy v. State, 126 S.W.2d 487 (Tex.Cr.App. 1939); and, Chambless v. State, 67 S.W.2d 309 (Tex.Cr.App. 1934), the Court of Appeals held the submission of the fourth punishment issue violated art. 37.07 (1)(a) and the trial judge erred in accepting an illegal verdict. McPherson, 828 S.W.2d at 85-86.

III.

In 1972, the Supreme Court struck down our capital sentencing scheme holding it violated the Eighth Amendment prohibition of cruel and unusual punishment. Furman v. Georgia, 409 U.S. 15, 92 S.Ct. 2726 (decided in conjunction

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[5]Attached to this motion were affidavits from two jurors. The jurors stated:

According to the instructions within the charge, we then proceeded to the fourth special issue. I can state absolutely that the vote on the fourth special issue was unanimous and was reached within one hour. There was some discussion on this issue. However, we basically were in agreement that the imposition of the death penalty against LARRY EUGENE MCPHERSON was not an appropriate or reasoned moral response to the facts of this case.

with Branch v. Texas). In 1973, the Legislature enacted a new capital sentencing scheme. Acts 1973, 63rd Leg., p. 1125, ch. 426, art. 3, §1, eff. June 14, 1973.

Art. 37.071 (b) provided for the submission of two or three statutory punishment issues to the jury, depending upon the evidence presented at trial. See, f n. 1, supra. If the jury affirmatively answered the issues, the sentence of death was mandatory. Tex. Code Crim. Proc. Ann. art. 37.071 (e). In Jurek v. Texas 428 U.S. 262, 96 S.Ct. 2951 (1976), the United States Supreme Court held art. 37.071 passed constitutional muster. The Court stated:

> We conclude that Texas' capital-sentencing procedures . . . do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at a separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function . . . Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the constitution.

Jurek, 428 U.S. at 276, 96 S.Ct. at 2958. The same capital sentencing scheme was in effect September 22, 1989, the date of the instant offense.

The Texas capital sentencing scheme withstood constitutional challenge until 1989[6] when the Supreme Court held art. 37.071 was unconstitutional, as applied, because the statutory punishment issues failed to provide a vehicle for the jury to give effect to the Penry's mitigating evidence. Penry v. Lynaugh, 492 U.S. 302 109 S.Ct. 2934.[7] The Court held:

> In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," (citation omitted), the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

Id., 492 U.S. at 328, 109 S.Ct. at 2951 [quoting Woodson v. North Carolina, 428 U.S. 280. 305: 96 S.Ct. 2978, 2991 (1976)]. Because Penry's mitigating evidence was "beyond the scope of the special issues," the evidence could not be given effect within the Texas capital sentencing scheme. Penry, 492 U.S. at 317, 109 S.Ct. at 2946.

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[6]The statute was unsuccessfully challenged in Franklin v. Lynaugh, 487 U.S. 1641 108 S.Ct. 2320 (1988). Franklin argued the capital sentencing scheme was unconstitutional because it did not allow the jury to consider and give effect to his disciplinary record in prison. The Supreme Court found that such evidence could be adequately considered within the second statutory punishment issue. Id., 487 U.S. at 177, 108 S.Ct. at 2329.

[7]Penry presented evidence that he was mentally retarded, abused as a child, and suffered from organic brain damage. Penry, 492 U.S. at 307-308, 109 S.Ct. at 2941-2942.

IV.

Although we have grappled with the application of Penry for some time,[8] the instant case presents our first opportunity to rule on the propriety of submitting a separate punishment issue concerning mitigating evidence.[9] It is important to note that the Supreme Court failed to specify what particular vehicle was required under the Eighth Amendment "for the jury to give mitigating effect to" a defendant's mitigating evidence which falls beyond the scope of the statutory punishment issues. Penry, 492 U.S. at 324-328, 109 S.Ct. at 2949-2952.

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[8]See, generally, Mines v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 70,893, delivered October 14, 1992) Allridge v. State, ___ S.W.2d ___, (Tex. Cr.App. No. 69,838, delivered November 13, 1991); Ex Parte Williams, 833 S.W.2d 150 (Tex.Cr.App. 1992); Draughon v. State, 831 S.W.2d 331 (Tex.Cr.App. 1992); Fuller v. State, 829 S.W.2d 191 (Tex.Cr.App. 1992); Goss v. State, 826 S.W.2d 162 (Tex.Cr.App. 1992); Ex Parte Kelly, 832 S.W.2d 44 (Tex.Cr.App. 1992) ; Joiner v. State, 825 S.W.2d 701 (Tex.Cr.App. 1992); Miniel v. State, 831 S.W.2d 310 (Tex.Cr.App. 1992); Moody v. State, 827 S.W.2d 875 (Tex.Cr.App. 1992) ; Ex Parte Harris, 825 S.W.2d 120 (Tex.Cr.App. 1991) ; Gosch v. State, 829 S.W.2d 775 (Tex.Cr.App. 1991); Ex Parte Bower, 823 S.W.2d 35 (Tex.Cr.App. 1991); Ex Parte Garrett, 831 S.W.2d 304 (Tex.Cr.App. 1991) ; Ex Parte McGee, 817 S.W.2d 77 (Tex.Cr.App. 1991) ; Mooney v. State, 820 S.W.2d 796 (Tex.Cr.App. 1991); Earhart v. State, 823 S.W.2d 607 (Tex.Cr.App. 1991); Ramirez v. State, 815 S.W.2d 636 (Tex.Cr.App. 1991) ; Ex Parte Rogers, 819 S.W.2d 533 (Tex.Cr.App. 1991); Trevino v. State, 815 S.W.2d 592 (Tex.Cr.App. 1991); Black v. State, 816 S.W.2d 350 (Tex.Cr.App. 1991); Ex Parte Goodman, 816 S.W.383 (Tex.Cr.App. 1991); Salvage v. Collins, 816 S.W.2d 390 (Tex.Cr.App. 1991); Ex Parte Ellis, 810 S.W.2d 208 (Tex.Cr-App. 1991); Ex Parte Baldree, 810 S.W.2d 213 (Tex.Cr.App. 1991) ; Ex Parte Herrera, 819 S.W.2d 528 (Tex.Cr.App. 1991); Lewis v. State, 815 S.W.2d 560 (Tex.Cr.App. 1991); Boyd v. State, 811 S.W.2d 105 (Tex.Cr.App. 1991); Gribble v. State, 808 S.W.2d 65 (Tex.Cr.App. 1990) ; James v. State, 805 S.W.2d 415 (Tex.Cr.App. 1990) ; Hammond v. State, 799 S.W.2d 741 (Tex.Cr.App. 1990) ; Jackson v. State, 822 S.W.2d 18 (Tex.Cr.App. 1990); and, Kinnamon v. State, 791 S.W.2d 84 (Tex.Cr.App. 1990).

[9]In Fuller v. State, 829 S.W.2d 191, 209 (Tex.Cr.App. 1992), we upheld a jury nullification charge which instructed the jury to answer one of the statutory punishment issues "no" if the jury felt the mitigating evidence militated against the death penalty. However, we did not hold that such an instruction was the exclusive manner of complying with Penry.

The Court of Appeals correctly recognized that art. 37.07 (1)(a) requires all verdicts to be general. The Court of Appeals then held that the fourth punishment issue was not a constitutionally necessary exception to art. 37.07(1)(a). The Court noted that a "nullification" instruction, allowing the jury to answer one of the statutory punishment issues negatively if they felt the mitigating evidence militated against the death penalty, would satisfy the Eighth Amendment considerations under Penry and not violate art. 37.07 (1)(a). Mcpherson, 828 S.W.2d at 83. We have held that such an instruction may be adequate to provide the constitutional protection required by Penry. Fuller v. State, 829 S.W.2d 190, 209.(Tex.Cr.App. 1992). See, fn. 8, supra. However, at the time of appellee's trial, we had not ruled on the sufficiency of an instruction to meet the demands of Penry. Clearly, the trial judge believed the Eighth Amendment and Penry required that the jury have a vehicle to consider and give effect to appellee's mitigating evidence. Having no guidance from the Supreme Court, or this Court, the trial judge chose to provide the fourth issue as a vehicle pursuant to the Eighth Amendment, as interpreted in Penry, which supersedes art. 37.07 (1)(a).

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance, thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, the Eighth Amendment takes precedence over art. 37.07(1)(a). Considering the failure of the Supreme Court

in Penry to provide guidance concerning the type of vehicle required to enable the jury to consider and give effect to mitigating evidence, and the lack of guidance at the time of appellee's trial, we will not fault the trial judge for submitting the fourth punishment issue in attempting to comply with the dictates of the Eighth Amendment. Once the trial judge determined appellee's mitigating evidence was beyond the scope of the statutory punishment issues, a vehicle, allowing the jury to consider and give effect to that evidence, was constitutionally required. Accordingly, we hold that the fourth punishment issue, which provided the jury a "means of considering and giving effect to (appellee's) mitigating evidence," was an appropriate response to the Supreme Court's decision in Penry. In light of our holding, the remaining grounds for review are dismissed as moot. Accordingly, the judgment of the Court of Appeals is reversed and the judgment of the trial court is affirmed. The cause is remanded to the Court of Appeals.[10]

BAIRD, Judge

(Delivered November 18, 1992)
En Banc
Publish

[10]Appellant's appeal to the Court of Appeals was abated pending resolution of the State's appeal.

THE STATE OF TEXAS

NO. 0354-92 V.

LARRY EUGENE McPHERSON, Appellee

Petition for Discretionary Review from the Seventh Court of Appeals [RANDALL County]

CONCURRING OPINION ON STATE'S AND APPELLEE'S PETITIONS FOR DISCRETIONARY REVIEW

Faced with the indisputable fact that a jury, authorized by the trial court to do so "in fairness or mercy" in accordance with instructions and a fourth special issue, unanimously determined that imposition of the death penalty on appellant is not "a reasoned moral response to (his) background, his character and to the crime of which he was convicted," a reviewing court is obliged to reject parochial rationales that would set aside the constitutional consequences of that decision.[1] See and compare Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989);[2] Jurek v. State, 522 S.W.2d 934

[1]All emphasis here and throughout this opinion is mine unless otherwise indicated.

[2]The lesson of Penry is its conclusion in Part III, viz:

"In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence . . . by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision. our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' (citations omitted). 'When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.' (citations omitted.)"

Id., at 328, S.Ct., at 2952, L.Ed.2d, at 284.

(Tex.Cr.App. 1975).[3]

The State contended for, and now naturally supports, the determination of the court of appeals that the trial court erred in submitting the fourth special issue because it is "not authorized by Texas Law." State v. McPherson, 828 S.W.2d 81, at 83-84 (Tex.App. — Amarillo 1992).[4] Because the opinion of this Court fails directly to address that proposition, cf. slip opinion, at 67, my purpose in writing is to demonstrate that contention and related reasons given for characterizing the verdict below as "illegal" are without merit. State v. McPherson, supra, at 84-85.

The court of appeals opined that while "a functional equivalent to an instruction might satisfy the Federal Penry requirement, under the relevant Texas statute, a special issue may not serve in that capacity" because Article 37.07, § 1(a), V.A.C.C.P., provides that "[t]he verdict in every criminal action must be general." McPherson, supra, at 83. But, in my view, where the question is propriety of submitting a special issue on punishment under the rubric of Penry v. Lynaugh, supra, reliance on such literal language of an archaic generality is severely misplaced.

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[3]Writing for the Court, Judge Morrison expressed an insightful understanding of basic principles to inform and guide participants in the judicial component of our criminal justice system, viz:

"Some discretion is inherent and desirable in any system of justice, from arrest to final judgment. . . . To eliminate all discretion on the part of the jury would be to risk elimination of that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence."

Id., at 940.

[4]Instead of the new trial ordered by the Amarillo Court of Appeals, however, the State prays here that we reverse the judgment of that court insofar as it remands the cause for a new trial, and then "reform the sentence of the trial court to reinstate the sentence of death." State's Brief at 8, 13.

Dating back to Old Code days when a jury found guilt and assessed punishment simultaneously, the provision lost its original intendment and function with advent of the alternative bifurcated procedure in Acts 1965, 59th Leg. Vol.2, Ch. 722, p. 317. Thereafter, the trial judge first submitted "the issue as to guilt or innocence . . . without authorizing the jury to pass upon the punishment to be imposed," and then in the latter separate proceeding the court gave "such additional written instructions as may be necessary[.]" Article 37.07, § 3(b); formerly 2(c). While it is true that the "verdict" is not "complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment," Id., § 3(c); formerly 2(d), the fact remains that the "general verdict" pertains only to guilt or innocence, whereas on punishment there is a separate "specific verdict" as to particular matters, viz: term of confinement, amount of fine and, when at issue, enhancement convictions, use of a deadly weapon, recommendation on probation, et. cetera.

Furthermore, since 1973, the punishment procedure in capital murder cases is provided exclusively by Article 37.071 rather than by Article 37.07, although the finding of guilt is still returned in a separate "general verdict." See Article 37.07, § 2(b), and compare with Article 37.071, § 2, et. seq.

The court of appeals read two earlier pre-Penry opinions of this Court to convey the idea that the three special issues constitute "an exception to the statutory prohibition of special issues." McPherson, supra, at 83. Both were addressing denials of requests for special findings at the guilt phase of trial; this Court alluded to Article 37.071, relative to Article 37.07, § 1(a), and although the Court may have overstated the effect of "the statutory prohibition of special issues" in the latter, in fact the Court applied that "prohibition" solely to special issues sought at the guilt stage.

Harris v. State, 790 S.W.2d 568, at 579 (Tex.Cr.App. 1989);[5] Stewart v. State, 686 S.W.2d 118, at 124- (Tex.Cr.App.1984).[6]

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[5]In Harris v. State, supra, the late Judge Duncan wrote for the Court about submitting a special issue inquiring whether the jury found a witness to be an accomplice, viz:

". . . Appellant's claim that the court's ruling was in error is without merit. Not only did the accomplice witness instruction properly and adequately protect appellant, but Article 37.07, § 1 (a) , V. A. C. C. P., provides that The verdict in every criminal action shall be general.' Thus, as was stated in Stewart v. State, 686 S.W.2d 118, 124 (Tex.Cr.App. 1984), 'other than the provisions in Article 37.071, V. A. C. C. P., Texas jurisprudence has no authority allowing the submission of special issues to a jury in a criminal case.' This is not to say that a special issue could never be constitutionally necessary despite the statutory prohibition of Article 37.07, § 1(a); supra. In this case, however, the trial court was correct in denying appellant's request."

[6]In Stewart v. State, supra, appellant contended that under Enmund v. Florida he was entitled to a special issue inquiring whether the jury found he personally killed the deceased or that he intended to kill or attempted to kill her. After pointing out for the Court that Enmund does not require such a finding, then Judge McCormick added:

"Furthermore, Article 37.07, Section l(a) provides that 'The verdict in every criminal case must be general.' Other than the provisions in Article 37.071, V.A.C.C.P., Texas jurisprudence has no authority allowing the submission of special issues to a jury in a criminal case. The trial judge acted properly in denying appellant's request."

Id., at 124.

Also raised in Stewart was the constitutionally of Article 37.071, in that "it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial" Id., at 121. The majority disposed of that contention thus:

"Because the Texas statutes do not preclude consideration of mitigating circumstances and because appellant has not proven the jury did not consider the mitigating circumstances in answering the first special issue, we overrule his fifth ground of error."

Id., at 122. But see dissenting opinion at 126 (jury must not be precluded "from according independent weight to factors that are mitigating but perhaps irrelevant to the probability issue of future dangerous conduct;" majority has "repeatedly denied the utility, much less necessity, of informing the jury that they may so consider that evidence." [emphasis in original]). Penry, of course, has since resolved that controversy. See post, at 5-6.

Thus in a capital case those decisions do not preclude using an appropriate special issue as a vehicle to inform the jury of its prerogative to consider and give effect to mitigating evidence in making a constitutional determination whether the defendant shall be sentenced to death or life imprisonment. Article 37.071(a).

In the instant cause the concern of the trial court was to provide the jury with a constitutional "vehicle" under Penry for expressing its "reasoned moral response" to mitigating evidence through "informing the jury that it could consider and give effect to the mitigating evidence . . . by declining to impose the death penalty." Id., at 328, S.Ct., at 2952, L.Ed.2d, at 284. That the judge chose first to instruct the jury as to the law of mitigation under Penry, and then to frame a fourth special issue designed to elicit its "reasoned moral response" is no more foreclosed by Article 37.07, § 1(a), than are the three special issues devised by the Legislature to narrow jury discretion to impose the death penalty.

The court of appeals nonetheless believed that because the Penry court wrote in terms of an "instruction" serving those constitutional purposes, "a special issue is not constitutionally necessary, and thus, is not an exception to the statutory prohibition of art. 37.07." McPherson, supra, at 83. But not only had Penry stated his claims in those terms in the trial court and in this Court, in his federal habeas petition and in the Court of Appeals for the Fifth Circuit, so also the Supreme Court granted certiorari in substantially the same terms. Penry, at 310, 311-313, S.Ct., at 2942, 2943-2944, L.Ed.2d, at 272, 273-274. By addressing his claims in those terms, therefore, the Supreme Court had no reason to deal with propriety of a special issue alone or in conjunction with an instruction; that it remained silent on that point does not mean that it ruled out a special issue. Indeed, ordinarily the Supreme Court leaves such matters as procedural "vehicles" to the States, just was done in State

v. Wagner, 786 P.2d 93 (Or. 1990) (opting for fourth special issue), cert. denied 498 U.S. ____ 111 S.Ct. 212, 112 L.Ed.2d 171 (1990), on remand from Wagner v. Oregon, 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583 (1989) (judgment in 752 P.2d 1136 vacated and remanded for further consideration in light of Penry).

After Penry, failure of a trial court to inform the jury that it could consider and give effect to mitigating circumstances violates rights of defendant under the Eighth Amendment and renders our capital punishment scheme mandated by former Article 37.071 unconstitutional. Under the Supremacy Clause, the Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, second paragraph.

The judge of the court below manifested his understanding and appreciation of the situation when he caused the court to give the instruction and to submit the fourth special issue to the jury. And, as the majority opinion at 3 reflects, the trial judge also understood and appreciated the dilemma thus created by affirmative answers to statutory issues and the negative answer to the constitutional issue: on one horn, the statutory mandate that the trial court sentence appellant to death because the jury returned an affirmative finding on each of the only three legislatively prescribed special issues; on the other horn, the absence of an explicit statutory mandate to implement the implicit constitutional dictate that bars the State of Texas from executing appellant because the jury returned a negative finding on special issue four, i.e., that the death penalty is not a reasoned moral response to mitigating evidence favoring appellant.

As it turned out on motion to reform the judgment, the trial judge opted for the constitutional dictate and, accord-

ingly, reformed the sentence of death to life imprisonment. In that he and we are by our oaths constitutionally bound to uphold the Eighth Amendment, the judge rightly caused the trial court to render the only judgment and impose the only sentence sanctioned by the Eighth Amendment, just as rightly we now affirm its reformation. Compliance with the Supremacy Clause may not be excused by the omission of the Legislature specifically to authorize the trial judge to instruct the jury according to Penry and to submit a special issue to elicit its "reasoned moral response" to mitigating evidence. When the choice is between life and death, the Eighth and Fourteenth Amendments command the States to void the risk that the death penalty will be imposed when mitigating factors extant may call for life. Penry, at 328, S.Ct., at 2952, L.Ed.2d, at 284.

With those comments and observations, I join the opinion of the Court.

CLINTON, Judge

DELIVERED: November 18, 1992
EN BANC
PUBLISH

APPENDIX "B"

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
NUMBER 0354-92

Larry Eugene McPherson

vs.

THE STATE OF TEXAS

On this the 20th day of February, 1993, the State's Motion for Rehearing was denied.

A TRUE COPY ATTEST:

THOMAS LOWE, CLERK
COURT OF CRIMINAL APPEALS

APPENDIX "C"

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
NUMBER 0354-92

Larry Eugene McPherson

vs.

THE STATE OF TEXAS

On this the 1st day of February, 1993, the State's Motion to Stay Mandate has been granted. The mandate has been stayed until the 22nd day of March, 1993.

A TRUE COPY ATTEST:

THOMAS LOWE, CLERK
COURT OF CRIMINAL APPEALS

APPENDIX "D"

The State of Texas,
Appellant

From the 251st District Court
of Randall County

v. No. 07-91-0151-CR

January 3, 1992

Larry Eugene McPherson,
Appellee

Opinion by Justice Boyd

JUDGMENT

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is therefore ordered, adjudged and decreed that the judgment of the trial court be reversed and the cause remanded for a new trial.

It is further ordered, adjudged and decreed that appellee Larry Eugene McPherson, pay all costs occasioned by this appeal for which let execution issue.

It is further ordered, adjudged and decreed that this decision be certified below for observance.

NO. 07-91-0151-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL B
JANUARY 3, 1992

THE STATE OF TEXAS, APPELLANT
V.
LARRY EUGENE McPHERSON, APPELLEE

FROM THE 251ST
JUDICIAL DISTRICT COURT OF RANDALL
NO. 7338-C; HONORABLE PATRICK A. PIRTLE,

Before DODSON, BOYD and POFF, JJ.

On April 3, 1991, after his conviction of capital murder, appellee Larry Eugene McPherson was sentenced to death. During the punishment phase of the trial, the three special issues mandated by article 37.071 of the Texas Code of Criminal Procedure were submitted to the jury.[1] Additionally, and over the objection of the State, a fourth issue was submitted. By the issue the jury was queried as follows:

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[1]By amendment effective September 1, 1991, article 37.071 now provides that different issues are submitted to the jury. However, by express provision of the law, that amendment did not become effective until September 1, 1991, and applies only to an offense committed after that date. Act of 1991, 72nd Leg., ch. 838, §5(a). Since the offense in question was allegedly committed on or about September 22, 1989, that amendment is not applicable to the disposition of this case.

> Do you find from the evidence, after considering fully the Defendant's mitigating evidence, if any, that the death penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted?

The jury answered the three special issues mandated by article 37.071 in the affirmative. The fourth special issue was answered in the negative. After receiving the answers to the issues, the trial court sentenced appellee to death.

Thereafter, appellee filed a motion for new trial, or in the alternative, to reform the judgment to provide for a life sentence. Based upon the jury's answer to the fourth special issue, the trial court granted that motion and reformed the death sentence to life imprisonment.

Initially, appellee had earlier filed a motion to dismiss the State's appeal on the ground that this court lacks jurisdiction. That motion was overruled without prejudice to reurging the matter upon submission of this appeal, and appellee now reurges that contention.

Courts of Appeals do not have appellate jurisdiction in criminal cases "in which the death penalty has been assessed." Tex. Code Crim. Proc. Ann. art. 4.03 (Vernon Supp. 1991). It is also provided that "The appeal of all cases in which the death penalty has been assessed shall be to the Court of Criminal Appeals." Tex. Const. art. V §5 (1981); Tex. Code Crim. Proc. Ann. art. 4.04 §2 (Vernon Supp. 1991). Thus, if this is a "case in which the death penalty has been assessed," this court is without jurisdiction.

The words "has been assessed" constitute a present perfect verb form. The present perfect tense of a verb is formed with the helping verb "has" or "have." H. Ramsey Fowler, The Little, Brown Handbook, 187 (1986). The present per-

fect verb tense indicates action occurring in the past and continuing to the present. Webster's Secretarial Handbook 282 (2d ed., 1983). The past perfect tense is formed by use of the helping verb "had." H. Ramsey Fowler, The Little, Brown Handbook, 187 (1986). The past perfect tense indicates action completed at a past time or before the immediate past. Webster's Secretarial Handbook 282 (2d ed., 1983).

The phrase "cases in which the death penalty has been assessed" contains the present perfect verb tense. That being so, the cases "in which the death penalty has been assessed," within the purview of the above authorities, are cases in which the assessment occurred in the past and continues to the present. In the present case, although the judgment at one time did call for the death penalty, it was reformed and does not do so now.

The language of the constitution and statutes is presumed to have been selected with care. Gallagher v. State, 690 S.W.2d 587, 592 (Tex.Crim.App. 1985); *see* Polk v. State, 676 S.W.2d 408, 410 (Tex.Crim.App. 1984). We must presume the verb tense used in article V §5 of the Texas Constitution and articles 4.03 and 4.04 of the Texas Code of Criminal Procedure was selected with care. Accordingly, the sentence before us is not one "in which the death penalty has been assessed" and over which the Court of Criminal Appeals has sole appellate jurisdiction. Appellee's motion to dismiss is overruled and we will proceed to consider the State's appeal.

In a single point, the State contends that the trial court erred in reforming appellee's sentence based on the jury's answer to the fourth special issue because the issue was not authorized by Texas law. In response, appellee asserts that the submission of the fourth issue is supported by Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

In the *Penry* case, the U. S. Supreme Court noted that a defendant might introduce mitigating evidence about his background, character or the circumstances of the crime that was not relevant to the special verdict questions of art. 37.071, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions. Id. 492 U.S. at 321. The Court stated that in the absence of instructions informing the jury that it could consider and give effect to such mitigating evidence, a jury is not provided with "a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." Id. 492 U.S. at 328.

In support of his response to the State's point of error, appellee argues that the *Penry* requirement of a "vehicle" to allow a jury to express its reasoned moral response to proper mitigating evidence is not limited to an instruction. He posits that a special issue may also provide such a "vehicle."

In considering the effect of the *Penry* decision, and of Penry-type mitigating evidence, our Court of Criminal Appeals in Gribble v. State, 808 S.W.2d 65, 76 (Tex.Crim.App. 1990), *cert. denied*, 111 S. Ct. 2856 (1991), cited *Penry* and referred to its requirement of a "functionally equivalent instructive device" to allow the jury to properly consider, and give effect to, the *Penry-type* of mitigating evidence. Likewise, in Judge Benevides' concurring opinion in Richardson v. State, No. 68,934, slip op. at 3 (Tex.Crim.App. June 12, 1991), in which the Court addressed a Penry-type situation, referred to the need for a jury instruction "or its functional equivalent." It is, of course, appellee's contention that the fourth special issue was functionally equivalent to a jury instruction and as such was permissible.

While it is true that a functional equivalent to an instruction might satisfy the Federal Penry requirement, under the relevant Texas statute, a special issue may not serve in that

capacity. Texas Code Crim. Proc. Ann. art. 37.07 §1(a) (Vernon 1981)[2] provides, "The verdict in every criminal action must be general." The three special issues mandated by art. 37.071 are an exception to the statutory prohibition of special issues. Harris v. State, 790 S.W.2d 568, 579 (Tex.Crim.App. 1989); Stewart v. State, 686 S.W.2d 118, 124 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 866 (1985).

While we cannot say that a special issue would never be constitutionally necessary despite the statutory prohibition of art. 37.07 §1(a), that is not the situation in this case. An instruction informing the jury that it could consider and give effect to Penry-type mitigating evidence would provide the jury with the mandated vehicle to allow the jury to express "its reasoned moral response" to such mitigating evidence. Penry v. Lynaugh, 492 U.S. at 302. Because a proper instruction serves the purposes delineated in *Penry*, a special issue is not constitutionally necessary, and thus, is not an exception to the statutory prohibition of art. 37.07.

Appellee also contends that the State has lost its right to raise purported error in the submission of the fourth special issue since the State (1) failed to object and (2) acquiesced in its submission. The State has filed a supplemental statement of facts which clearly shows that the State objected to the submission of the fourth special issue. That being so, appellee's first contention is without merit.

Appellee contends that by its conduct the State acquiesced in the submission of the fourth issue and has, therefore, lost its right to complain of that submission. The thrust of this assertion is that the State participated in the discussion of the wording of the issue. Indeed, appellee contends that the final wording of the issue was the result of the State's efforts in that discussion.

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[2]All future references to article numbers are to those articles of the Texas Code of Criminal Procedure, unless specifically stated otherwise.

In support of his contention, appellee relies upon the decisions in Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); Wilson v. State, 692 S.W.2d 661 (Tex. Crim. App. 1984); and Lee v. State, No. 870-90 (Tex. Crim. App. October 2, 1991)(not yet reported). However, those cases are distinguishable.

In the *Steagald* case, the government raised for the first time on appeal before the Supreme Court the argument that Steagald lacked an expectation of privacy in the house sufficient to prevail on a Fourth Amendment claim. The Court concluded that the government through its assertions, concessions and acquiescence, lost its right to challenge Steagald's assertion that he possessed a legitimate expectation of privacy in the searched home. *Id.*

The Court's holding was based upon the government's actions in (1) acquiescing in statements by the lower courts characterizing the search as being one of Steagald's residence, (2) arguing during trial and appeal that petitioner's connection with the searched home was sufficient to establish his constructive possession of the cocaine found in a suitcase in the closet of the house, (3) failing to file a cross-petition for certiorari suggesting, as later requested before the Supreme Court, remand for factual determination of the matter, but rather, arguing that further review was unnecessary, and (4) expressly representing in its opposition to certiorari that the searched home was petitioner's residence. *Id.*

In *Lee*, appellant had been charged with the offense of murder and was found guilty of the lesser-included offense of voluntary manslaughter. No. 870-90 (Tex.Crim.App. 1991). The Court held Lee could not complain on appeal that the

evidence failed to establish the elements of voluntary manslaughter. The basis of the Court's holding was that Lee had invoked the benefit of the lesser-included offense charge at trial by not objecting to its submission to the jury and indeed, requesting its submission to the jury. *Id.*

In *Wilson*, the State asserted for the first time on appeal that Wilson did not have standing to challenge the search there in question. 692 S.W.2d at 661. In that case, the Court held there was no evidence in the record that affirmatively showed Wilson lacked such standing and further, the State had failed to timely raise the question of standing in the trial court. Thus, the State was prohibited from raising the question on appeal. *Id.*

In the *Wilson* case, the Court stated:

> The State should not be allowed to challenge standing for the first time on appeal if that challenge is inconsistent with its position in the court below. The reason is that to allow such a procedure would deny the defendant the opportunity to present evidence of standing since the defendant would have been led, by the State's position below, to believe that the State was not challenging his standing or had acquiesced to his standing (appellant in his brief at bar refers to such a procedure as "sandbagging").

Id. at 663.

Unlike the cases relied upon by appellee in the case at bar, the State never engaged in such conduct constituting acquiescence and, at the time of the completion charge, timely objected to the submission of the issue. The mere fact, as is commonly done in this state, that the State may have participated in the discussion and preparation of the issue to some extent, under this record, was not sufficient

to mislead the trial court or appellee into believing it did not oppose the submission of the issue.

Having made the decision that the trial court erred in the submission of the fourth issue, it now becomes our duty to decide the proper disposition of this appeal. In Pritchard v. State, 117 Tex. Crim. 106, 35 S.W.2d 717 (1931), a plea for a suspended sentence had not been filed and no such issue had been submitted to the jury. Despite this, the jury returned a verdict sentencing the defendant to two years confinement and recommending a suspended sentence. That verdict was received by the trial court. However, that court ignored the portion of the verdict recommending a suspended sentence and entered judgment fixing Pritchard's punishment at two years' confinement in the penitentiary. *Id.* at 717.

The Court of Criminal Appeals held that the trial court erred in entering an unauthorized judgment upon a verdict which the court should not have received and that action made it necessary to reverse and remand the case. *Id.* at 718. In doing so, the Court cited with approval a portion of the dissent in Bassett v. State, 78 Tex. Crim. 110, 180 S.W. 249 (1915), which stated:

> If it be held that the defendant could not get the benefit of the suspended sentence without his sworn application, then the jury returned a verdict which they were not authorized to do, and the court did not have any authority to receive it. An illegal verdict is a paradox. If illegal, it is not to be received or enforced. If he did not like the verdict and thought it was illegal, he should have sent the jury back and required them to find a proper verdict . . . . If the verdict is illegal, the court cannot legalize it by receiving it.

Id. at 250-51.

In King v. State, 135 Tex. Crim. 71, 117 S.W.2d 800 (1938), the trial court erroneously instructed the jury if they found King guilty they might also specify the length of time, up to two years, he was prohibited from driving a motor vehicle on state highways. The law had been changed at that time to provide for an automatic driver's license suspension of six months for a first-time offender such as King. The jury returned a verdict of guilty and fixed the punishment at one year's confinement in the penitentiary and a driver's license revocation of two years.

In an effort to correct its error, the trial court followed the verdict as far as assessing the year's confinement in the penitentiary but ignored the portion of the verdict calling for a two-year driver's license suspension and rather, revoked the license for six months. The appellate court, commenting that a trial court cannot accept a jury verdict, discharge the jury and then decline to follow the verdict in material part, and held that the trial court's action required a reversal and remand of the case. In doing so, the Court made the following observation, significant to the question before us:

> In the present case the jury believed from the instruction they had received that they could suspend appellant's driving license for two years. If they had not so believed a different verdict entirely might have been reached. It is not a case where this court can reform a judgment.

Id. at 801.

> The basic principle that a trial court may not accept an illegal verdict has been repeatedly applied by the Court of Criminal Appeals. Garrett v. State, 159 Tex. Crim. 203, 262 S.W.2d 414 (1953);

McCoy v. State, 136 Tex. Crim. 473, 126 S.W.2d 487 (1939); Chambless v. State, 125 Tex. Crim. 188, 67 S.W.2d 309 (1934). Parenthetically, we note that Tex. Code Crim. Proc. Ann. art. 37.10(b)(Vernon Supp. 1992) provides that if the jury assesses both punishment authorized by the law and punishment not authorized by the law, the court shall reform the verdict to show the punishment authorized by law and to omit the unauthorized punishment. However, in a capital case such as this one, the jury does not assess the punishment but it is assessed by the court based upon the jury's answers to special issues submitted.

In this case, the jury returned a verdict, which in part determined that after full consideration of the defendant's mitigating evidence, the death penalty was not a reasoned moral response to the defendant's background, his character, and to the crime of which he was convicted. As we have earlier noted, this fourth issue was not authorized under the applicable Texas law.

An illegal verdict is not to be received or enforced if it is illegal, and the court cannot legalize it by receiving it. Pritchard v. State, 117 Tex. Crim. 106, 35 S.W.2d 717 (1931). Because the trial jury here returned a verdict which they were not authorized to return, the trial court had no authority to receive it.

It has long been established that jury verdicts must be certain and their meaning and construction must not be left in doubt or speculation. Batten v. State, 549 S.W.2d 718, 722 n.7 (Tex.Crim.App. 1977); Allen v. State, 138 Tex. Crim. 303,136 S.W.2d 232, 233 (1940). This is especially true in capital cases. In the words of the Court in Eads v. State, 598 S.W.2d 304, 307 (Tex.Crim.App. 1980), "In view of the extreme penalties involved, it is most important that a verdict in a capital murder case be certain and its meaning and construction must not be left in doubt or to speculation." Because we cannot speculate as to the effect the submis-

sion of the fourth issue may have had upon the jury's answers to the preceding three issues, the jury's verdict in this case is not sufficiently certain.

Previously, reversible error at the punishment hearing before the jury left the appellate court without authority to direct a new trial or penalty hearing before a different jury on the issue of punishment alone. *See* Eads v. State, 598 S.W.2d at 308; Bullard v. State, 548 S.W.2d 13, 18 (Tex.Crim.App. 1977); Brumfield v. State, 445 S.W.2d 732, 740 (Tex.Crim.App. 1969). This was so because the verdict of the jury is not complete until a verdict upon both guilt and punishment has been returned. Tex. Code Crim. Proc. Ann. art. 37.07 SS 3(c); Bullard v. State, *supra*.

However, by amendment effective September 1, 1991, art. 44.29 currently provides that if a Court of Appeals or the Court of Criminal Appeals awards a new trial only on the basis of an error or errors made in the punishment stage of the trial, then the trial court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage.

The amendment authorizes commencement, in certain circumstances, of a new punishment hearing for a defendant convicted of capital murder. However, that amendment applies only to an offense committed on or after September 1, 1991. Acts of 1991, 72nd Leg., ch. 838 5(a). Since the present offense was committed prior to that effective date, the 1991 amendment is not applicable to this cause.

Prior to the 1991 amendment, art. 44.29(c) specifically stated, "This section does not apply to convictions under Section 19.03 (capital murder) of the Penal Code. In such cases, the cause shall stand as it would have stood in case the new trial had been granted by the court below." Therefore, in this capital murder case, arising prior to September 1, 1991, the error in the punishment hearing mandates that

this court remand this cause for an entire new trial.

Our disposition of this matter obviates the need to address the remaining assertions of appellant and appellee. As a proper verdict at the punishment stage of this trial was not received, we have no alternative but to reverse the judgment of the trial court and remand the cause for a complete new trial.

John T. Boyd

Justice
Publish

APPENDIX "E"
NO. 07-91-0151-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL B
FEBRUARY 12, 1992

THE STATE OF TEXAS, APPELLANT
V.
LARRY EUGENE McPHERSON, APPELLEE

FROM THE 251ST
JUDICIAL DISTRICT COURT OF RANDALL COUNTY;
NO. 7338-C; HONORABLE PATRICK A. PIRTLE, JUDGE

Before DODSON, BOYD and POFF, JJ.

ON MOTIONS FOR REHEARING

Both parties have filed motions for rehearing in this proceeding. We remain convinced that our original disposition of the case was correct. Accordingly, we overrule both motions.

However, in doing so, we must point out that nothing in our original opinion should be construed as holding that the evidence which appellee contended entitled him to the fourth special issue or an instruction of like nature, met the criteria for such an instruction set out in *Penry v. Lynaugh*,

492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In the disposition which we made of the case, consideration of that question was not necessary. Accordingly, nothing in our original opinion should be interpreted as expressing an opinion on that issue.

John T. Boyd

Justice
Publish